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No. 04-818

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VERNON LEE EVANS, JR.

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Did the Court of Appeals of Maryland correctly conclude that there was no *ex post facto* violation in Evans's capital sentencing proceeding?

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BRIEF IN OPPOSITION

Respondent, the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, Vernon Lee Evans, Jr. Evans is under sentence of death in Maryland, having been convicted in the Circuit Court for Worcester County, Maryland, in 1984, of first degree murder and other crimes.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, *Evans v. State*, 382 Md. 248, 855 A.2d 291 (2004), is reproduced in the appendix to Evans's petition. (App. 1a-38a). The unpublished memorandum opinion and order of the Circuit Court for Baltimore County denying relief is likewise reproduced in the appendix to Evans's petition. (App. 41a-46a).

JURISDICTION

Evans has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). (Pet. for Cert. at 1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions on which Evans relies are reproduced in the appendix to the Petition for Certiorari. (App. 47a-53a)

STATEMENT OF THE CASE

A. Procedural history

By an indictment presented in the Circuit Court for Baltimore County, Maryland, on June 30, 1983, the State of Maryland ("State") charged Evans with first degree murder of

David Scott Piechowicz, first degree murder of Susan Kennedy, and other offenses. *Evans v. State*, 304 Md. 487, 495, 499 A.2d 1261, 1265 (1985) (*Evans II*). The State notified Evans of its intention to seek the death penalty. *Id.* Pursuant to Evans's exercise of his automatic right of removal, the case was transferred to the Circuit Court for Worcester County, Maryland. *Id.* That court denied Evans's pretrial motion to dismiss under the Double Jeopardy Clause, and in Evans's ensuing interlocutory appeal the Maryland Court of Appeals affirmed. *Evans v. State*, 301 Md. 45, 58, 481 A.2d 1135, 1141 (1984), *cert. denied sub nom. Grandison v. Maryland*, 470 U.S. 1034 (1985) (*Evans I*).

A jury subsequently convicted Evans on both first degree murder counts and other charges. *Evans II*, 304 Md. at 494, 499 A.2d at 1264. In the ensuing capital sentencing hearing the same jury imposed two sentences of death. *Id.* On direct appeal, the Maryland Court of Appeals affirmed the convictions and sentences. *Id.* at 539, 499 A.2d at 1288. The court also denied Evans's subsequent motion for reconsideration. *Foster, Evans, and Huffington v. State*, 305 Md. 306, 319, 503 A.2d 1326, 1333 (1986) (*Evans III*). This Court denied certiorari on June 30, 1986. *Evans v. Maryland*, 478 U.S. 1010 (1986) (order).

On March 28, 1991, the Circuit Court for Worcester County partially granted Evans's petition for post conviction relief by vacating Evans's death sentences pursuant to *Mills v. Maryland*, 486 U.S. 367, 384 (1988), but denied relief as to Evans's guilt/innocence convictions. The Maryland Court of Appeals denied the State's application for leave to appeal and Evans's cross-application. *State v. Evans*, Misc. No. 8, Sept. Term, 1991 (order filed June 4, 1991).

Evans, in connection with the re-sentencing, filed a suggestion for removal and the case was returned to the Circuit Court for Baltimore County. *Evans v. State*, 333 Md. 660, 666, 637 A.2d 117, 120 (1994) (*Evans IV*). A jury in a capital re-

sentencing hearing in that court returned two death sentences. *Id.* On direct appeal, the Maryland Court of Appeals affirmed. *Id.* at 699, 637 A.2d at 136. This Court denied certiorari on October 3, 1994. *Evans v. Maryland*, 513 U.S. 833 (1994) (order).

On August 29, 1995, Evans filed in the Circuit Court for Baltimore County another petition for post conviction relief. After an evidentiary hearing, the court denied the petition in its entirety by a decision dated January 24, 1997. The Maryland Court of Appeals denied Evans's application for leave to appeal from the denial of post conviction relief on May 7, 1997. *Evans v. State*, 345 Md. 524, 693 A.2d 780, *cert. denied*, 522 U.S. 966 (1997).

Evans filed a federal habeas petition on November 3, 1997, 180 days after the state appellate court's final order. On April 12, 1999, Evans filed a motion for stay of the federal habeas proceeding, asking the district court to hold his petition in abeyance while he returned to state court to litigate an alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation, and then permit him to amend the petition if unsuccessful in state court. The district court denied the motion, finding that allowing Evans a stay and then leave to amend his petition would circumvent the intent of the habeas statute. The district court then denied Evans's petition on June 30, 1999, *Evans v. Smith*, 54 F. Supp.2d 503 (D. Md. 1999), and a motion to alter or amend judgment.

On August 25, 1999, Evans filed in the Circuit Court for Baltimore County a motion to re-open his post conviction proceedings based on the alleged *Brady* violation. The Circuit Court for Baltimore County denied the motion without a hearing on October 20, 1999. Evans's application for leave to appeal that denial was denied by the Court of Appeals of Maryland on December 16, 1999. *Evans v. State*, Misc. No. 18, Sept. Term, 1999 (order). On February 1, 2000, Evans filed another petition for writ of habeas corpus in federal district

court raising the *Brady* claim. Simultaneously, he filed a motion in the Fourth Circuit for authorization to file a second or successive petition. Before either court ruled on his filings, Evans filed another motion with the district court on February 3, 2000, asking that the February 1 habeas filing be treated as a Rule 60(b) motion. On February 16, 2000, the Fourth Circuit denied Evans authorization to file a second or successive petition and his motion to stay.

On July 17, 2000, the Fourth Circuit affirmed the district court's denial of Evans's federal habeas petition and affirmed the district court's denial of a stay. *Evans v. Smith*, 220 F.3d 306, 325 (4th Cir. 2000). Evans filed a petition for writ of certiorari with this Court on December 12, 2000, which was denied on March 19, 2001. *Evans v. Smith*, 532 U.S. 925 (2001) (order).

On April 2, 2001, Evans filed another motion to re-open post conviction proceedings and a motion for stay in the Circuit Court for Baltimore County. The motion to re-open post conviction was based on claims that the indictment was fatally defective under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that his death sentence was based on racial bias. Those motions were denied on October 12, 2001. The Court of Appeals of Maryland denied Evans's application for leave to appeal those rulings on December 14, 2001. *Evans v. State*, Misc. No. 10, Sept. Term, 2001 (order).

On May 8, 2000, during the pendency of his appeal in the Fourth Circuit, Evans filed a motion for new trial and a motion to correct an illegal sentence in the Circuit Court for Baltimore County. Hearings were held on April 18 and December 3, 2002. The trial court denied the motions on July 18, 2003. (App. 41a-46a). On July 23, 2004, the Court of Appeals of Maryland affirmed the rulings of the lower court. *Evans v. State*, 382 Md. 248, 855 A.2d 291 (2004). (App. 1a-38a). On September 10, 2004 the Court of Appeals of Maryland denied Evans's motion for reconsideration. (App. 1a).

B. Statement of Facts

On direct appeal from Evans's guilt/innocence trial, the Court of Appeals of Maryland summarized the salient facts of Evans's offenses as follows:

> The basic facts of the case are as follows. According to the State's evidence, the defendant Evans and Anthony Grandison entered into an agreement whereby Evans would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a narcotics case pending in the United States District Court for the District of Maryland. Evans was to receive $9,000.00 from Grandison for performing the murders.
>
> David Scott Piechowicz and Cheryl Piechowicz were employed at the Warren House Motel in Baltimore County. On April 28, 1983, Susan Kennedy, the sister of Cheryl Piechowicz, was working in place of Cheryl at the Warren House Motel. The evidence was sufficient to prove beyond a reasonable doubt that, on April 28th, Evans went to the motel and, not knowing the Piechowiczes, shot David Scott Piechowicz and Susan Kennedy with a MAC-11 machine pistol. Nineteen bullets were fired at the victims, who died from the multiple gunshot wounds.
>
> A two count indictment was filed against Evans and Grandison in the United States District Court. They were charged with violating the Piechowicz's civil rights by interfering with their right to be witnesses in a judicial proceeding, in violation of 18 U.S.C. § 241, and with witness tampering, in violation of 18 U.S.C. § 1512.
>
> Subsequently the present case began with a four count indictment in the Circuit Court for Baltimore County, charging Evans and Grandison each with two

> counts of first degree murder, one count of conspiracy to commit murder, and use of a handgun in the commission of a felony or crime of violence. Upon the defendants' requests for removal, Grandison's trial was transferred to the Circuit Court for Somerset County and Evans's trial was transferred to the Circuit Court for Worcester County.
>
> Prior to the trial in the instant case, Evans was convicted on the federal charges and sentenced to life plus ten years imprisonment. He then filed a pretrial motion to dismiss the charges in this case on double jeopardy grounds. The motion was denied by the trial judge, and this Court affirmed. *Evans v. State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, 470 U.S. 1034, 105 S. Ct. 1411, 84 L.Ed.2d 795 (1985).

Evans II, 304 Md. at 494-96, 499 A.2d at 1264-65.

The United States Court of Appeals for the Fourth Circuit reviewed the evidence presented at Evans's trial as follows:

> During the state trial, the prosecution offered overwhelming incriminating evidence against Evans through a number of witnesses. The most damaging testimony came from Charlene Sparrow, who was Evans' girlfriend at the time of the murders. Sparrow testified that she accompanied Evans and Janet Moore to the Baltimore City Jail two days before the shooting. At the jail, Evans and Moore met with Grandison, who was awaiting his federal drug trial. Sparrow then inspected the reception desk area of the Warren House Motel. She reported to Evans concerning the people working there and the presence or absence of security features. Sparrow also obtained a room at the motel with Evans' funds at his request. On the day of the murders, Evans told Sparrow to wait for him in the car behind the motel. Just before Evans walked to the motel, Sparrow looked inside the brown canvas bag he

was carrying and saw a machine gun. Some ten to fifteen minutes later, Evans returned to the car, gave the smoking MAC-11 machine gun to Sparrow, and asked her to wipe it down. Evans had also told her that he would receive $9,000 "if he knocked both of them off." Evans and Sparrow went to the mall that night to spend part of the proceeds from the murders.

Other witnesses also supplied incriminating testimony as to Evans' central role in the murders. For example, Moore testified as to her and Evans' visit to Grandison at the jail two days before the killings. Calvin Harper testified concerning the day of the murder and the two days leading up to it. Harper's testimony included a description of Evans' acquisition of the machine pistol used in the crime from Rodney Kelly and Evans' statement that he liked the gun. Several other witnesses were able to place Evans in the motel lobby during the time immediately preceding the murders. For example, Etta Horne, who worked at the motel, identified Evans as the man she saw sitting in the motel lobby shortly before the murders. Helen Kondilidis, who had entered the motel shortly before the murders, also identified Evans as the man she saw sitting in the lobby.

220 F.3d at 310.[1]

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[1] Evans refers in his petition to what he claimed in his most recent state appeal was newly discovered evidence that showed that he was not the shooter. Pet. at 8 n.5. The Court of Appeals of Maryland considered each piece of evidence offered by Evans and concluded as follows:

> Evans's present argument is based upon a farfetched theory unsupported by any evidence. It rests entirely upon the well-known fact that eyewitness

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS OF MARYLAND CORRECTLY CONCLUDED THAT THERE WAS NO *EX POST FACTO* VIOLATION IN EVANS'S CAPITAL SENTENCING PROCEEDING.

Evans claims that the jury instruction given at sentencing and re-sentencing, which reflected a change in Maryland's death penalty statute, violated the prohibition against *ex post facto* laws. Pet. at 9-10. Specifically, he argues that, when the Maryland legislature removed intoxication from the list of statutory mitigating factors in 1983, after the crimes were committed in his case, it unfairly increased his burden of proof. *Id.* Although the Court of Appeals of Maryland rejected reasoning identical to that of Evans in *Booth v. State*, 327 Md. 142, 608 A.2d 162, *cert. denied*, 506 U.S. 988 (1992), Evans maintains that, in light of this Court's decision in *Carmell v. Texas*, 529 U.S. 513 (2000), the earlier holding of the state court in *Booth* is no longer good law. Pet. at 9-10. The Court of Appeals of Maryland properly rejected this claim.[2]

> descriptions of an individual or estimates of time will likely vary. In our view, there is virtually no possibility that any jury would find that Evans was involved in the murders only as a principal in the second degree. The evidence that Evans was the "triggerman" is overwhelming.

382 Md. at 264-72, 855 A.2d at 300-05.

[2] Although the State argued that Evans's sentence was not inherently illegal under Maryland law and, further, that Evans had waived any *ex post facto* claim by failing to raise it before

1. *Carmell v. Texas* Is Not Retroactive.

Relying on this Court's opinion in *Carmell*, Evans asserts that that case makes the Maryland court's holding in *Booth* erroneous. However, in order to prevail on such a theory, Evans must first establish that the holding in *Carmell* is retroactive.[3] This he cannot do.

Carmell is not retroactive under federal law. Under this Court's doctrine of nonretroactivity, "'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,'" *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (quoting *Teague v. Lane*, 489 U.S. 288, 310-11 (1989)), unless "the relief sought falls within one of two narrow exceptions to nonretroactivity." *Id.*

> The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, *see Teague,* [489 U.S. at 311], or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, [494 U.S. 484, 494 (1990)](quoting *Penry v. Lynaugh,* [492 U.S. 302, 329 (1989)]. . . .
>
> The second exception is for "'watershed rules of criminal procedure' implicating the fundamental

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now on direct or collateral review in state or federal court, the Court of Appeals, nonetheless, chose to review the claim on its merits. 382 Md. at 278-80, 855 A.2d at 309-10.

[3] The Court of Appeals of Maryland did not address the issue of retroactivity under either federal or state law, although the State raised that issue in its brief.

> fairness and accuracy of the criminal proceeding. *Ibid.* (quoting *Teague*, [489 U.S. at 311.

520 U.S. at 539-40. *Accord Beard v. Banks*, 124 S. Ct. 2504, 2513 (2004).

Evans's conviction was final well before the decision in *Carmell*. This Court's decision in *Tyler v. Cain*, 533 U.S. 656 (2001), resoundingly dismisses any claim that *Carmell* is retroactive in the context of Evans's jury instruction complaint. With respect to the second exception, which is the only one Evans could conceivably rely on, the Court in *Tyler v. Cain* explained why the rule of *Cage v. Louisiana*, 498 U.S. 39 (1990)(per curiam), regarding a reasonable doubt instruction, was not retroactive:

> [T]he second *Teague* exception is reserved only for truly "watershed" rules. *See O'Dell, supra*, at 167; *see also Caspari v. Bohlen*, 510 U.S. 383, 396 (1994)(describing such rules as "groundbreaking"); *Graham v. Collins*, 506 U.S. 461, 478 (1993)(explaining that the exception is limited to "a small core of rules," which not only seriously enhance accuracy but also "requir[e] 'observance of those procedures that . . . are implicit in the concept of ordered liberty'")(*quoting Teague, supra,* at 311 (internal quotation marks omitted)); *Saffle v. Parks*, 494 U.S. 484, 495 (1990)(focusing on "primacy and centrality" of the rule). *As we have recognized, it is unlikely that any of these watershed rules "ha[s] yet to emerge."*

533 U.S. at 666 n.7 (emphasis added)(citation omitted). *Accord Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004). *See also Banks* ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception").

This Court has not said that *Carmell* is retroactive and, given its more recent retroactivity analysis, there is no reasoned basis to believe that the Court would ever do so.

2. There Has Been No *Ex Post Facto* Violation.

Even if Evans could surmount the retroactivity hurdle necessary to place the *ex post facto* claim before this Court, the claim would fail on the merits. When the murders took place on April 28, 1983, Maryland's death penalty statute listed seven specific mitigating circumstances, including:

> The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

Md. Code Ann., Art. 27, § 413(g)(4)(1982 Repl. Vol.).[4] Then, as now, Maryland's statutory death penalty scheme also allowed the sentencer to consider "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." *Id.*, § 413(g)(8). Approximately one month after the murders, Maryland's governor signed an act, the effective date of which was July 1, 1983, that amended Article 27, Section 413(g)(4) to eliminate intoxication as a statutorily enumerated mitigating circumstance. 1983 Md. Laws, Ch. 296.

On direct appeal from his third death sentence, another Maryland capital litigant, John Booth-El, complained that the 1983 change, whereby intoxication was eliminated as a specific statutory mitigating circumstance, violated the federal and state constitutional prohibitions against *ex post facto* laws. In response to Booth-El's complaint, the Court of Appeals of Maryland described the effect of this change in law as follows:

> Prior to the 1983 enactment the burden was on the

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[4] That provision is now found in the Criminal Law Article, Section 2-303(h)(2)(iv). The State will cite to the codification as it existed at the time of Evans's sentencing proceedings.

> murderer to prove by a preponderance of the evidence diminished capacity as a result of intoxication. If the jury found that fact, then the statute determined that that circumstance was mitigating and that it was to be considered in weighing whether the aggravating circumstance outweighed intoxication and any other mitigating circumstances. After the change, the murderer has the burden of proving by a preponderance of the evidence both the fact of diminished capacity due to intoxication and that that fact is a mitigating circumstance. *See Hunt v. State*, 321 Md. 387, 437, 583 A.2d 218, 242 (1990), *cert. denied*, 502 U.S. 835, 112 S.Ct. 117, 116 L.Ed.2d 86 (1991); *Foster v. State*, 304 Md. 439, 482, 499 A.2d 1236, 1258 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986). Both before and after the 1983 amendment, the amount of weight to be given to intoxication as a mitigating circumstance turned on the judgment of each individual juror.

327 Md. at 169, 608 A.2d at 175 (footnote omitted). The *Booth* court went on to hold as follows:

> The prohibition against *ex post facto* laws is defined by three historic categories. *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 2721, 111 L.Ed.2d 30 (1990).
>
> > "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."
>
> *Id.* at ----, 110 S.Ct. at 2719 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925)). The change to § 413 did not deprive Booth of

> any defense to the crime of murder that was available at the time of the murder. The change, which involves only procedures at the sentencing phase of trial, does not fit in either of the other *ex post facto* categories.
>
> Changes in trial or appellate procedure that had consequences far more disadvantageous to the defendant than the change to Maryland's § 413 have been held not to offend the *ex post facto* clause. *See Collins*; *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Evans v. Thompson*, 881 F.2d 117 (4th Cir.1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *United States v. Mest*, 789 F.2d 1069 (4th Cir.1986), *cert. denied*, 479 U.S. 846, 107 S.Ct. 163, 93 L.Ed.2d 102 (1986).

327 Md. at 170-71, 608 A.2d at 175-76. After relating the circumstances in each of these cited cases, the Court stated as follows:

> Following the change in the Maryland statute the defendant continues to have the burden of producing evidence on intoxication and of persuading as many jurors as possible to find as a fact that the defendant was intoxicated. The change affects only the procedure for determining whether the fact, if found, is mitigating. It is absolutely clear that amended § 413 does not remove intoxication as a potential mitigating circumstance in death penalty proceedings. The preamble to the amending act declares:
>
> > "The General Assembly is aware that the Supreme Court has held that evidence of the intoxication of a defendant in a case involving the death penalty must be allowed and considered as a factor in mitigation. The General Assembly further believes that such mitigating factor should be considered under the eighth mitigating factor and not highlighted

> specifically so as to appear more as justification than as one of the many factors that may be considered as possible mitigation. In striking the word intoxication from the fourth mitigating factor, the General Assembly is not eliminating the consideration of intoxication but altering the emphasis presently indicated...."

Chapter 296 of the Acts of 1983.[11]

* * *

The amendment to § 413 did not change the fact that first-degree murder during commission of a robbery was punishable by death, a fact of which pre- existing Maryland law gave Booth clear notice. *See Dobbert*, 432 U.S. at 297-98, 97 S.Ct. at 2300 (death penalty law in effect at time of murders and later found unconstitutional nevertheless "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose"); *Grandison v. State*, 305 Md. 685, 754, 506 A.2d 580, 614 (change specifying impact statements from families of murder victims to be used in capital sentencing did not change the "quantum of punishment attached to the crime"), *cert. denied*, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986); *Booth II*, 306 Md. at 222, 507 A.2d at 1123-24 (same); *Tichnell v. State*, 287 Md. 695, 737, 415 A.2d 830, 852 (1980) (even if Maryland statute were unconstitutional before addition of catch-all mitigation instruction, statute gave defendant "fair warning as to the degree of culpability which Maryland ascribes to the act of murder"); *Evans*, 881 F.2d at 120. The amendment did not remove any factors from the jury's consideration in finding mitigation; nor did it make inadmissible any previously admissible evidence. *See United States v. Mest*, 789 F.2d at 1071-72; *see also Collins*, 110 S.Ct. at 2719 n.

3.

None of the purposes of the prohibition against *ex post facto* laws would be served by applying the prohibition here. In *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the Supreme Court, in a case involving punishment additional to that prescribed at the time of the offense, identified two principal protections the clause affords. First, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 450 U.S. at 28-29, 101 S.Ct. at 964. As we have already pointed out, § 413 gave fair warning that first-degree murder in the commission of a robbery was potentially punishable by death. To paraphrase Professor Tribe in his discussion of *Dobbert*, "[Booth's] reliance interest [on the benefits of being intoxicated while he murdered] hardly deserves mention, let alone respect." *See* L. Tribe, *American Constitutional Law* § 10-3, at 640 (2d ed. 1988).

Second, "[t]he ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation." 450 U.S. at 29, 101 S.Ct. at 964. Even murderers "are entitled to something better than a legislative lynching." L. Tribe, *supra*, at 640. But in this case, as in *Dobbert*, there was no actual risk of legislative abuse. House Bill 62, which later became Chapter 296 of the Acts of 1983, was pre-filed in the 1983 legislative session. The bill was introduced in the House of Delegates on January 12, 1983. It passed the House on March 23 and in the Senate on April 6, 1983. The Attorney General approved the bill for constitutionality and legal sufficiency on May 11, 1983. The Bronsteins were murdered on May 18. The only action taken on the bill after the murders was its signing

by the Governor. Plainly the Legislature could not have, and did not, contemplate John Booth when it deleted intoxication as an express mitigating circumstance on the sentencing form. *See also* L. Tribe, *supra*, at 640 n. 26 (speculating that legislation adding an aggravating circumstance in response to the events of a particular murder still might not violate the *ex post facto* ban if the amendment were drawn "in terms broad enough to encompass not just the particular individual who is ultimately convicted of the specific killing at issue but anyone else who meets similar criteria").

* * *

For all these reasons, the changes to § 413 do not violate *ex post facto* prohibitions.

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[11] The Legislature may have desired to avoid giving the appearance of equating voluntary intoxication with involuntary mental illness.

327 Md. at 172-76, 608 A.2d at 177-78.

Booth-El raised the claim of an *ex post facto* violation in his federal habeas petition. While the federal district court found that there had been an *ex post facto* violation, based on the 2000 decision in *Carmell*, the Fourth Circuit reversed that ruling, finding that under the case law existing in 1992 when the Maryland court decided Booth-El's appeal, that decision was a reasonable application of clearly established federal law. *Booth-El v. Nuth*, 288 F.3d 571, 577-78 (4th Cir.), *cert. denied*, 537 U.S. 959 (2002). However, the Fourth Circuit further held that the change in Maryland's death penalty statute was purely procedural. *Id.* at 578-79. It did not remove intoxication as a possible mitigator or remove any mitigating factors from the jury's consideration. *Id.* at 579. As a procedural change, the panel found it far less disadvantageous to a defendant than others which have been found not to violate the Ex Post Facto

Clause, citing to *Collins*, *Dobbert*, and decisions of the Fourth Circuit in *Evans* and *Mest*. *Id*. at 579-80. Booth-El's petition for writ of certiorari to this Court, raising *inter alia* the *ex post facto* claim, was subsequently denied. *Booth v. Maryland*, 506 U.S. 988 (1992).

In Evans's most recent appeal, the Court of Appeals of Maryland reviewed its reasoning in *Booth* and found that it was entirely consistent with this Court's *Carmell* decision. 382 Md. at 281-85, 855 A.2d at 310-13.

> In our view, *Carmell v. Texas* neither overrules *Booth v. State*, *supra*, 327 Md. at 168-176, 608 A.2d at 174-178, nor renders the fourth category of *Calder v. Bull* applicable to Ch. 296 of the Acts of 1983. The fourth category of *Calder v. Bull* and the holding of *Carmell* relate to changes in rules of *evidence* to facilitate a *conviction*. Such changes lessen the prosecution's burden of proof. As discussed in Part III A of this opinion, the change brought about by Ch. 296 did not affect the *evidence* to establish the existence of a mitigating circumstance, did not affect the *weight* to be given a mitigating circumstance, and did not alter the evidentiary burden of proof to establish any *fact*. As earlier pointed out, Ch. 296 changed nothing with regard to the existence of or weight to be given a mitigating circumstance.
>
> The only modification brought about by Ch. 296 concerned a *judgment* as to whether a particular circumstance should be regarded as mitigating. Instead of the Legislature indicating its judgment that intoxication should be deemed mitigating, Ch. 296 provided that each juror should make that judgment. In the final analysis, however, there was no significant change regarding that judgment. Both before and after the enactment of Ch. 296, the judgment as to how much *weight* should be given the factor of intoxication

> belonged to the jurors.
>
> Ch. 296 of the Acts of 1983 was not a "law that alters the *legal* rules of evidence, and receives less . . . testimony, than the law required at the time of the commission of the offense, *in order to* [decide against] *the offender*." *Calder v. Bull*, 3 Dall. at 390, 1 L.Ed. at 650. Consequently, the application of Ch. 296 to Evans's 1992 sentencing hearing did not violate the *ex post facto* prohibition.

382 Md. at 285, 855 A.2d at 312-13 (emphasis in original).

Thus, even if one were willing to overlook the fact that Evans's death sentence is not illegal, that he has waived the claim by not raising it earlier, and that *Carmell* is not retroactive, Evans still would not prevail, because the change in Maryland's death penalty statute does not fit even within the fourth *Calder* factor. It was procedural only and changed no rule of evidence to Evans's detriment. Under either statute, Evans ultimately had to present evidence of intoxication sufficient to convince the jury that such intoxication mitigated against imposition of the death penalty. Finally, the jury at Evans's re-sentencing did consider his drug use, citing it as a mitigating factor. Thus the jurors who so found were required to weigh it into their decision to impose the death penalty.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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